RECOGNITION OF BELLIGERENCY AND THE SPANISH WAR

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I

Few problems raised by the Spanish civil war are more interesting than those growing out of the fact that a state of war, in the legal sense, does not exist; belligerent rights have been accorded to neither of the contestants by third Powers. Consequently, on January 8 of this year, Germany turned over to the rebel authorities two Spanish loyalist vessels captured in retaliation to an "act of piracy"—an indictment earned by the loyalist government for its seizure of the German freighter, *Palos*.[1] One may feel justifiably surprised that a government almost universally recognized as legitimate can be charged with piratical activities. Further reflection reveals that the Spanish situation presents many more questions concerning the rights and duties of the contestants as against third parties. In the absence of the recognition of belligerency, what are the rights of loyalist and rebel ships on the high seas? In the territorial waters of Spain? May the fascist or socialistic factions establish blockades? What are the powers and validity of their prize courts? Who is answerable for the illegal acts of the rebels should they lose—or be victorious? What claims will the Spanish Government have as against third Powers should one or the other prove successful? May the loyalist authorities by simple decree close to neutral trade the ports held by the insurgents? Moreover, how would all of these matters be affected if the maritime Powers of the world were to recognize the existence of a state of war, *i.e.*, belligerency, in Spain? And, finally, in view of the magnitude and duration of the struggle, is there any justification for withholding such recognition?

The last of these queries presents an interesting field for investigation. The unusual measures taken in January by the German Government, as well as the diligence with which other maritime Powers guard their merchantmen from search or seizure by belligerent ships, emphasize in a realistic sense the importance of the power of recognition possessed by third parties, supposedly disinterested, in a civil war. Without recognition of the belligerency of the insurgents, the searches and seizures of merchantmen by loyalist men-of-war on the high seas are contrary to law. Even more strictly limited are the commissioned vessels of the rebel government: the legality of their visitations not only is unrecognized on the high seas but also is questioned when committed within the territorial waters controlled by their forces.[2]

[1] New York Times, Jan. 9, 1937.

[2] At the present time the rebel warships are accorded some of the rights of war within the three-mile limit. (See below, pp. 399, note; 404.)

An examination of the authorities reveals that the usual approach to this question is from the standpoint of third Powers. That is, when are outside States justified in recognizing an insurgent group as *de jure* belligerents and, therefore, entitled to all the rights of war? Premature recognition may be looked upon by the parent State as a gratuitous demonstration of sympathy which in certain cases may amount to an unfriendly act. Consequently, the authorities are unanimous in emphasizing the necessity for caution on the part of foreign States. But, once an insurrection acquires sufficient force and permanency, and the interests of third Powers are affected thereby, recognition of belligerency is perfectly justifiable in the eyes of international law. It would be futile to attack the propriety of this principle. Recognition given too early in civil struggles may be tantamount to intervention and lead to international friction. But, there is some reason for feeling that the nature and extent of the Spanish insurrection today warrants a different approach to the question. In the face of irrefutable evidence, third Powers have refused up to this time to accord the Spanish rebels the status of belligerents. By the same token, of course, the established Spanish Government is denied the rights of war.[3] The war is not war in the technical or legal sense, because third Powers have felt constrained to withhold recognition of belligerency. In view of this anomaly, the writer may be justified in considering the subject of recognition from the standpoint of the hostile parties. Can a brief be prepared maintaining that recognition should automatically follow once an insurrection has attained sufficient intensity and proportions? Or, even further, may an insurgent group demand as a matter of right international recognition of their belligerency, once the facts support their claim?

II

Dana's note in Wheaton's *International Law* contains a frequently quoted statement of the accepted law on the subject:

> The tests to determine the question (belligerency) are various, and far more decisive when there is a maritime war and commercial relations

[3] Though it is true that there is no requirement for specific recognition of belligerency of a recognized government, unless third Powers recognize the existence of a state of war by according to the insurgents a belligerent status, the parent State may not exercise, as against third States, rights of war on the high seas. (However, it is still free to act against neutral shipping found within its territorial seas.) See International Law Situations, Naval War College (1902), p. 79. In answer to questions of the Opposition in the House of Commons last November, Foreign Minister Anthony Eden accepted this view: "His Majesty's Government have not thus far accorded belligerent rights at sea to either side in the Spanish struggle and have no present intention of according such rights. As a consequence, His Majesty's ships will, should it prove necessary, protect British merchant ships on the high seas against interference by ships of either party engaged in the conflict in Spain outside the three mile limit." (London Times, Nov. 24, 1936.) France adopted a similar stand: "Inside the three mile limit French merchant ships will submit to the control of local authorities under international law. But beyond that zone the French Government will permit no halting, visiting or seizure by either of the two Spanish fleets." (New York Times, Nov. 25, 1936.)

> with foreigners. Among the tests, are the existence of a *de facto* political organization of the insurgents, sufficient in character, population, and resources to constitute it, if left to itself, a State among nations, reasonably capable of discharging the duties of a State; the actual employment of military forces on each side, acting in accordance with the rules and customs of war, such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent State as prisoners of war; and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war before they are all ripened into activity.[4]

Foreign Powers, viewing an internal insurrection which has reached the above dimensions, are fully justified in acknowledging the struggle as war and the insurgents as entitled to the rights of belligerents.[5] Military and political fact must govern recognition, for "The question of belligerency is one of fact not to be decided by sympathies for or prejudices against either party. The relations between the parent state and the insurgents must amount, in fact, to war in the sense of international law." [6]

Hall carries the question a bit further, distinguishing between three possible situations that may appear as a result of civil war. First, if the insurgents are isolated in the midst of loyal provinces, the question of recognition hardly arises, since the interests of third States are not likely to be affected. Second, if the rebels control territories contiguous to a neutral Power, the problem, at least as far as that State is concerned, may have to be faced. Third, in cases where internecine disputes involve maritime warfare, the presumption is in favor of recognition. National interest, therefore, constitutes an additional test, and when involved, provides greater justification for recognizing a state of war.[7]

Provided with sufficient factual and political reasons, third Powers may extend recognition either tacitly or explicitly. "It is now usually express; *i.e.* it occurs through a formal Declaration or Proclamation of Neutrality, such as was issued by Great Britain soon after the outbreak of our civil war." [8] Once

[4] Dana's edition of Wheaton, International Law (1866), p. 35, note.

[5] See also, The Prize Cases, 2 Black 635; Ford *v.* Surget, 97 U. S. 611 ff.; A. S. Hershey, Essentials of International Public Law and Organization, rev. ed. (1927), p. 203 ff.; Manley O. Hudson, Cases and other Materials on International Law, pp. 161–162; J. B. Moore, Digest of International Law, I, p. 166 ff.

[6] President Grant's special message to Congress on June 13, 1870, refusing to recognize the belligerency of the Cuban insurgents. (Moore, Digest, I, p. 194.)

[7] W. E. Hall, A Treatise on International Law, 8th ed. (1924), p. 39. Hershey is inclined to support this view: Such recognition does not follow as a matter of course when the facts are present but depends upon whether the neutral's "own rights and interests are so affected as to require a definition of its own relation to the parties." (*Op. cit.*, p. 206.)

[8] Hershey, *op. cit.*, p. 204. See also, "Rights and Duties of Foreign Powers as regards the established and recognized governments in case of insurrection," adopted by the Insti-

legally established, the state of belligerency permits both contestants the rights of war.[9]

> If the contest is a war . . . the commissioned cruisers of both sides may stop, search, and capture the foreign merchant-vessel, and that vessel must make no resistance and must submit to adjudication by a prize court. If it is not a war . . . the ships of war of the foreign State may attack and capture any cruiser persisting in the attempt. If it is war, foreign nations must await the adjudication of prize tribunals. If it is a war, the parent state may institute a blockade *jure gentium* of the insurgent ports, which foreigners must respect; but if it is not a war, foreign nations having large commercial intercourse with the country will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials, at sea and in port, as lawful belligerents. If it is not a war, those cruisers are pirates, and may be treated as such. If it is a war, the rules and risks respecting carrying contraband, or dispatches, or military persons, come into play. . . .[10]

As a further result of recognition, Wilson feels that "the recognizing state may hold the belligerent community responsible for its acts, if the community establishes its independence. If the belligerent community fails to establish itself, the recognizing state can hold no one responsible for acts of the revolting community subsequent to the date of recognition of belligerency." [11] The implication here seems to be that before belligerency is legally acknowledged, the parent State may be held responsible for injuries wrought upon third parties by the rebels. The authorities are divided upon this question, but in the Spanish war today it is almost inconceivable that third Powers, who refuse to recognize a state of war, will later put forward claims upon the Spanish Government, in the event of its success, for damages inflicted upon their nationals by the insurgents.[12]

Especially germane to the issue raised by the refusal of outside States to recognize belligerency in Spain is the legal principle that recognition is a matter of domestic policy, to be determined and acted upon by the recognizing State. Hamilton Fish, writing to Mr. Motley, our Minister to England, in relation to the *Alabama* Claims, expressed the American viewpoint: "The President does not deny, on the contrary he maintains, that every sovereign power decides for itself, on its responsibility, the question of whether or not

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tute of International Law in 1900, in Scott's Resolutions of the Institute of International Law (1916); McKinley's message to Congress, Dec. 7, 1897, objecting to a joint resolution of Congress recognizing the belligerency of the Cuban rebels, Moore, Digest, I, p. 199. As far as the parent State is concerned, the belligerency of rebels is hardly ever expressly recognized. However, the nature of the actions adopted by the established government to suppress the revolt may constitute recognition by implication. (See Hall, *op. cit.*, p. 43.)

[9] Hershey, *op. cit.*, p. 204.

[10] Dana's Wheaton, p. 36, note.

[11] G. G. Wilson, International Law (1910), p. 41.

[12] "If the revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of . . . responsibility." (Underhill *v.* Hernandez, 168 U. S. 253.) See also, U. S. *v.* Rice, 4 Wheaton 246.

it will, at a given time, accord the status of belligerency to the insurgent subjects of another power, . . ." [13] This opinion, based upon national sovereignty, is held by many authorities, who feel that recognition does not follow as a matter of course nor is it a right possessed by insurgents.

> . . . such provinces in revolt are not entitled by the law of nations, *to rights* as equal parties to a civil war. They have properly no rights, and the concession of belligerency is not made on their account, but on account of considerations of policy on the part of the state itself which declares them such, or on grounds of humanity.[14]

Recognition of belligerency is usually considered a matter to be determined by the political branches of government alone,[15] and, once given, bestows rights of war upon the warring parties *vis à vis* the recognizing State or States only. This principle is to be found in the resolutions drawn up by the Institute of International Law in 1900 [16] and it appears to be solidly sustained by good opinion.[17] Consequently, should every neutral Power in the world, Britain excepted, recognize a state of war in Spain, British merchantmen could still claim immunity from search by commissioned war vessels. A possible exception to this rule may arise should the parent State itself explicitly recognize the belligerency of the insurgents and proceed to an act of war, such as a naval blockade, affecting the interests of third Powers. In such a situation some authorities feel that foreign Powers would be bound to recognize the existing state of things and to accord to both the hostile parties rights of war.[18] "Official notice of such a proclamation makes it the duty of foreign nations to conform to the international rules of war in that regard. . . ." [19] If this view-

[13] U. S. Foreign Relations, 1873, III, 336. See also, Grant's message of Dec. 6, 1869, dealing with the Cuban insurrection. (Moore, Digest, I, p. 194.)

[14] T. D. Woolsey, International Law, 6th ed., rev. (1897), p. 292. See also, Wilson, *op. cit.*, p. 40; Hall, *op. cit.*, p. 39; Pitt Cobbett, Cases and Opinions on International Law (1913), Part I, p. 67; *The Three Friends*, 166 U. S. 1; Moore, Digest, I, pp. 188–189.

[15] *The Three Friends*, 166 U. S. 1. See also, U. S. *v.* Palmer, 3 Wheaton 610, 643; *The Santissima Trinidad*, 7 Wheaton 283; The Prize Cases, 2 Black 635; Rose *v.* Himely, 4 Cranch 292; U. S. *v.* Yorba, 1 Wall. 412; U. S. *v.* Hutchings, 2 Wheel. c.c. 542; *The Hornet*, 2 Abbott 35; U. S. *v.* Baker, 5 Blatch. 6.

[16] Art. IV, Sec. 2, Scott's Resolutions of the Institute of International Law (1916).

[17] Pitt Cobbett, *op. cit.*, p. 289; G. G. Wilson, *op. cit.*, p. 41; Thomas L. Harris, The Trent Affair (1896), p. 40. The Permanent Court of International Justice, in its Judgment No. 7, observed that the recognition of the Polish National Army by the Allies during the World War "cannot be relied on as against Germany which had no share in the transaction." (Publications of the Court, Series A, No. 7, p. 28.)

[18] Dana's Wheaton, p. 374 ff.; Hall, *op. cit.*, pp. 39–40; Rose *v.* Himely, 4 Cranch 239, 272; Moore, Digest, I, p. 165; T. Twiss, Law of Nations, 2nd ed. (1875), p. 500.

[19] Ford *v.* Surget, 97 U. S. 610. Oppenheim is not so definite: "Such recognition may be granted by the State within the boundaries of which the civil war broke out, and then other States will in most cases, although they need not, likewise recognize a state of war. . . ." (McNair's Oppenheim, International Law, 4th ed. (1926), Vol. II, p. 124.) The resolutions of the Institute of International Law of 1900 flatly refute this view: ". . . a third power is not bound to recognize insurgents as belligerents merely because they are recognized as such by the government of the country in which the civil war has broken out." (Art. V, Sec. 1.)

point is correct, Spain, by recognizing the belligerency of the rebels, could lay claim to belligerent rights on the high seas. Under such conditions her seizure of the German ship, *Palos*, would be properly within the bounds of international law, giving her grounds for a future claim against Germany because of that nation's armed retaliation.[20] That the Spanish Government have not explicitly recognized the insurgents, up to the present time, may be due to their reluctance to establish a legal state of war which might enhance the scope and success of rebel arms.

Fully aware of the inconveniences and inconsistencies inherent in non-recognition when war actually prevails, third Powers have made it a practice in the past to distinguish between belligerency and insurgency, between war in the legal sense and war in the material sense, between war *de jure* and war *de facto*.[21] As a consequence, insurgents gained the right to carry on limited naval operations within the territorial waters under their actual control without running the risk of being treated as pirates by foreign States.[22] There have been several causes for this practice. "Recognition of insurgency has several times been given by the United States with the primary object of bringing into effect the neutrality laws applicable to a state of war" without conferring, at the same time, the right to search and seize on the high seas.[23] On other occasions the principle has been invoked to prevent a government closing by simple decree, rather than by blockade, certain of its ports temporarily controlled by insurgents. In 1861 Great Britain refused to consent to an order of New Granada prohibiting intercourse between foreign States and ports that had fallen into the hands of rebels. While admitting such a move to be proper in peacetime, Lord John Russell insisted that it violated during war the law requiring blockades to be real and effective.[24] Finally, humani-

[20] This incident, however, is further complicated by the fact that Germany recognizes the government of the rebels. The loyalist forces are the rebels in her eyes and are unable to demand and exercise belligerent rights.

[21] "*A Status of Insurgency* may be recognized when an insurrection with a political purpose has assumed the proportions of a war 'in a material sense,' and when it seriously interferes with the exercise of sovereignty or with normal foreign intercourse." (Hershey, *op. cit.*, p. 201.) See also, Dana's Wheaton, note, p. 377; Moore, Digest, I, p. 164; *The Three Friends*, 166 U. S. 1.

[22] The principle is widely held that unrecognized belligerents have the right within the marginal seas to prevent their domestic opponent from obtaining war supplies from abroad. See Moore, Digest, II, pp. 1085–1086, 1089, 1112, 1118, 1119, 1120; Wilson, *op. cit.*, p. 47; Hershey, *op. cit.*, p. 203; Hall, *op. cit.*, Sec. 5a; Westlake, *op. cit.*, I, p. 56; U. S. Foreign Relations, 1893, p. 99. But the "existence of the power is restricted to the precise end to be accomplished." In no case is the neutral vessel to be treated as an enemy. (International Law Situations, Naval War College (1902), p. 79.)

[23] C. G. Fenwick, International Law, 2nd ed. (1934), p. 113. In 1895 Cleveland recognized the insurgency of the Cuban revolutionists and enjoined the observance of the neutrality laws. (Moore, Digest, I, p. 242.) His position was sustained in the case of *The Three Friends*, 166 U. S. 1.

[24] Hansard, Parliamentary Debates (3rd ser.), clxiii, 1646. President Cleveland adopted a similar attitude in answer to Colombia's attempt to close insurgent ports during the

tarian considerations have played some part in the development of the theory of insurgency. The crop of revolutions reaped by the world during the nineteenth century necessitated, in the absence of belligerency, some compromise principle which would elevate a political rebel to a plane higher than a pirate. ". . . an act of revolt or rebellion against a Sovereign must not be confounded with an act of Piracy, which is denominated hostility against the human race." [25] During the first weeks of the Spanish war, foreign Powers were inclined to ignore Franco's claim to the rights which the laws of insurgency permit within territorial waters. As the war progressed this stand was modified and as early as November, 1936, France conceded that "Inside the three mile limit French merchant ships will submit to the control of local authorities under international law." [26] Great Britain made a similar concession at the time.[27] Any doubt as to whether Franco has been recognized as an insurgent was removed finally by Mr. Eden on April 14 of this year. During the debate in the House of Commons on a vote to censure the Government for its alleged failure to protect British shipping and neutral rights off the coast of Spain, the British Foreign Minister declared that if any British ship, even proceeding against the Board of Trade instructions, were attacked on the high seas it would be protected but, he said, "we cannot guarantee, in view of the conditions there, that those ships would be safe in the territorial waters around Bilbao." [28]

III

If the newspaper reports are accurate, the scope of the Spanish war today legally justifies recognition of belligerency by foreign States.[29] The revolt has endured many months and experts predict that it will continue for an indefinite period. Armies and navies are employed by both sides. There have been exchanges of prisoners. The rebels have established a provisional government which exercises sovereignty over a large part of the country.

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revolution of 1885: "An effective closure of ports not in the possession of the Government, but held by hostile partisans, could not be recognized. . . ." (Message to Congress, Dec. 8, Messages and Papers of the Presidents, Vol. X, p. 4911.) See also, Woolsey, *op. cit.*, pp. 294–295.

[25] Instructions to the American Collector of Customs, July, 1815, regarding the treatment to be accorded ships of South American revolutionists. (Moore, Digest, I, p. 170.) This view has become a part of international law: See Dana's Wheaton, note, p. 377; *The Ambrose Light*, 25 Fed. Rep. 408; Hershey, *op. cit.*, p. 331. Though England captured many American privateers during the Revolution before the colonies were recognized as belligerents, none of them was ever treated as a pirate. (Francis Wharton, Albany Law Journal, 13 (1886), p. 129.) For a complete treatment of this subject, see *ibid.*, pp. 125–131.

[26] New York Times, Nov. 25, 1936.

[27] London Times, Nov. 24, 1936.

[28] The Bulletin of International News, Royal Institute of International Affairs, Vol. XIII, No. 22, pp. 18–19.

[29] *Op. cit.*, Philip C. Jessup, "The Spanish Rebellion and International Law," in Foreign Affairs, Jan., 1937, p. 271.

Furthermore, irritating naval incidents involving foreigners occur almost daily, providing ample evidence that the interests of third Powers are intimately affected. In fact, all of the traditional tests outlined above which justify recognition have been met. But no nation has yet recognized a legal state of war. The right to carry on full maritime operations on the high seas and along the Spanish coast is still denied the warring parties. In view of the dangers inherent in the recurring naval episodes, one might feel that recognition of belligerency would ease the situation, clarify the relation of neutrals to the war and delineate more sharply the rights of the contestants. Indeed, one may go so far as to contend that the far-flung dimensions of the conflict alone should suffice to bring into play the rules of maritime as well as land warfare, recognition following as a matter of course. Authority for this viewpoint is not lacking.

In 1779 John Paul Jones, having made prizes of several English merchant vessels, sent them into Norwegian ports. Shortly thereafter the Danish Government delivered them up to the British on the ground that Jones' commission, issued by a government not yet recognized by the world, was not valid in the eyes of Danish law. The United States at once demanded compensation, arguing that, in the event of a revolution in a sovereign empire by one portion of it, if a foreign Power did not acknowledge the independence of the new State while civil war raged, "it must, while remaining passive, allow to both the contending parties all the rights, which public war gives to independent sovereigns." [30] From that day until 1844 the claim was kept alive by sporadic action on the part of the American Government "and does not appear to have been ever formally dropped." [31]

President Monroe, dealing with the recognition of revolutionary bodies in Spanish America in the early part of the nineteenth century, announced again the principle that an advanced stage of rebellion entitles the rebels to the rights of war. "As soon as the [revolutionary] movement assumed such a steady and consistent form as to make the success of the provinces probable, the rights to which they were entitled by the law of nations, as equal parties to a civil war, were extended to them." [32] During the same decade the British Government adopted a similar position when the Turkish Government remonstrated following British recognition of Grecian belligerency in 1825. His Majesty's Government maintained that "the character of belligerency was not so much a principle as a fact, that a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be

[30] W. B. Lawrence's Wheaton, Elements of International Law (1863), Introd., cxxxiv.

[31] Hall, *op. cit.*, note, p. 38. In fact, in 1806 and 1848 Congress went as far as to pass acts paying the captors or their representatives their share of the captures in advance. (Lawrence's Wheaton, pp. 41–42.)

[32] Message to Congress, March 8, 1822, Moore, Digest, I, 174. There appears to be a serious objection, however, to positing probability of success as a condition for recognition. In many cases it is almost impossible to forecast the ultimate outcome of war. At least such is the situation in Spain at this time.

treated as a belligerent, and even if this title were questionable, rendered it the interest well understood of all civilized nations so to treat them." [33]

The diplomatic dispute occasioned by Britain's recognition of Southern belligerency during the American Civil War drew from English lawyers a statement that could well be used by the Spanish rebels as grounds for searching British merchant vessels suspected of carrying contraband to the opposition. In 1864 the law officers of the Crown advised that

> the question whether a state of war does or does not exist between insurgents holding possession of a particular territory, and a Government claiming their allegiance and attempting to subdue them, is one of fact, quite as much as of law: and, if the facts are such, as really to constitute a state of war between the contending parties, according to the law of nations, it is not, we think, competent, by law, to any neutral Power, to withdraw its ships and subjects, upon the high seas, from the operation of the ordinary laws incident to the state of things merely by declining to acknowledge its existence.[34]

In an opinion handed down in The Prize Cases, Judge Grier supported the contention that a state of belligerency arises out of a condition of fact:

> When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereigns, the world acknowledges them belligerents and the contest a war . . . It is not necessary to constitute a war, that both parties should be acknowledged as independent nations or sovereign States.[35]

We find the principle stated again in Ford *v.* Surget: ". . . the contest, though it originated in rebellion, must in the progress of events, when it assumes such proportions as to be justly denominated civil war, be recognized as entitling both parties to the rights of war just as much as if it was waged between two independent nations." [36] And in Williams *v.* Bruffy: ". . . in a civil war the contending parties have a right to claim the enforcement of the same rules which govern the conduct of armies in wars between independent nations. . . ." [37]

Early writers on the law of nations were inclined to the same opinion, basing their view on humanitarian grounds. Bluntschli wrote:

> . . . when a political body pursues the realization of certain public ends, and has organized itself into statehood, it becomes in a certain

[33] Hansard, *op. cit.*, clxii, 1566. "It has been the constant practice of European nations and of the United States to look upon belligerency as a fact rather than a principle." (Francis Wharton, Digest of International Law (1886), Vol. I, p. 519.) "I am not aware that in this country any solemn proceeding, either legislative or executive, has been adopted for the purpose of declaring the status of an insurrectionary movement abroad, . . . Whether a civil war was prevailing in Peru is a question of fact, to be judged by the proofs. . . ." (Sec. of State Cass to the Peruvian Minister, Mr. Osma, with reference to the Vivanco insurrection in Peru, May 22, 1858. (S. Ex. Doc. 69, 35th Cong., 1st Sess., 24–25.)

[34] Jessup, *loc. cit.*, p. 267. [35] 2 Black 666, 667. [36] 97 U. S. 611. [37] 96 U. S. 191.

> measure a state. The laws of humanity require, that the quality of belligerent be accorded to the party. . . . The party who is strong enough to create powers analogous to those of a state and who by its military organization offers sufficient guaranty of order, and proves by its political conduct its determination to become a state, such party has a natural right to be treated in the same manner as an already existing state.[38]

Commenting on the problem raised by the American Civil War, Montague Bernard pointed out the humanitarian aspect of recognition:

> But this, I think, cannot be denied—that recognition in such cases has been sanctioned by the practice and opinion of nations, not solely with a view to the protection of the neutral, but on wider grounds of general expediency. It is generally expedient that the ordinary rules of war should extend, as far as possible, to civil wars. The restraints which they impose are here as wholesome, their influence in making war regular and humane and in confining its range are as useful. . . . These considerations appear to show not only that recognition may be conceded, but that it ought not to be withheld.[39]

Some writers go so far as to claim that once an advanced degree of insurgency has been reached, the rebels have a *right* to be considered as belligerents: "It is not only the privilege but also the duty of foreign states to recognize a state of war, or belligerency, after such a state exists in fact." [40] Other authorities, mindful of the effect of war upon third parties, declare that when a civil war is accompanied by maritime activities, rebel claims to belligerent rights are materially enhanced: ". . . in the instance of maritime operations recognition may be compelled." [41] "If the struggle is maritime, recognition is almost a necessity." [42] "If the insurgent government in addition possesses ports and a naval force on the high seas, the reasons for recognition become almost mandatory on the neutrals." [43] It is a matter of common knowledge

[38] *Völkerrecht* (1868), Sec. 512, Note 1. Vattel held that "when a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground in every respect as a public war between two different nations . . ." (Law of Nations (1853), p. 427.)

[39] Neutrality of Great Britain during the American Civil War (1870), pp. 115–116. ". . . the concession of such (belligerent) rights may at a certain epoch in the strife, be claimed both in the interest of humanity and of neutral states." (W. O. Manning, Commentaries on the Law of Nations (1875), p. 298.)

[40] Thomas L. Harris, The Trent Affair, p. 40. "But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." (Dana's Wheaton, p. 374.) "If I understand the authorities correctly, there exists, not only the right, but also the duty, on the part of the United States to recognize the belligerency of the Cubans." (Statement of Horatio S. Reubens concerning the Cuban revolt of 1895, in Tomas Estrada Palma's Cuban Belligerency (1896), p. 32.)

[41] *The Three Friends*, 166 U. S. 1.

[42] U. S. *v. The Ambrose Light*, 25 Fed. Rep. 408. See also, Dana's Wheaton, note, p. 35.

[43] Elbert Jay Benton, International Law and Diplomacy of the Spanish American War,

that the Spanish rebels control several Spanish ports and that both they and the loyalists are carrying on naval operations affecting third parties.[44] The military junta of the rebels has been transformed into a totalitarian government headed by General Franco and has been recognized by five countries.[45] Insurgents are in control of a great part of Spain. War exists. If the opinions of the authorities mentioned above carry any weight, it should follow that the contestants are entitled to all the rights of war, on sea as well as on land.

IV

Accepting, for the moment, the position of those who argue that war *de jure* arises only after neutral Powers have recognized it, can one successfully maintain that recognition of that status has been granted by implication? There have been instances in the past when a state of war has been acknowledged to exist despite the lack of an explicit utterance to that effect. Referring to the relations of the United States with South American countries during the early nineteenth century, Latané declares that "It does not appear that any formal declaration according belligerent rights to the said provinces was ever made. . . . Such formal action was apparently not deemed necessary . . . our ports were probably thrown open as a matter of course." [46] In the case of *The Ambrose Light*, growing out of the Colombian revolt of 1885, an American court held that the contents of a note sent to the Colombian Minister by the American Secretary of State amounted to "recognition by implication of a 'state of war' and of mutual belligerent rights, sufficient to prevent subsequent condemnation of rebel vessels as piratical." [47] Recognition can be tacit as well as express [48] and one is led to speculate as to whether the maritime operations of commissioned war vessels in the Spanish war have been made legitimate as a result of the international activities of foreign Powers.[49]

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p. 41. For similar opinions see: Hershey, Annals of the American Academy of Political and Social Science, Vol. VII, p. 450; Moore, Forum, Vol. XXI, p. 288; Woolsey, American Foreign Policy, p. 25; Hall, *op. cit.*, pp. 35–36. In a message to Congress, Dec. 7, 1875, President Grant implied that recognition of the Cuban rebels would have been forthcoming but "The insurrection has not possessed itself of a single seaport whence it may send forth its flag . . ." (Moore, Digest, I, p. 197.) An extreme example of recognition is presented by the action of the Allies recognizing the belligerency of Czechoslovakia when the insurgents had no established territory under control. "If that be so, the inference might follow that it is quite immaterial whether the rebels possess fixed territory, have an organized government, or fight like civilized beings." (T. J. Lawrence, The Principles of International Law, 7th ed. (1923), p. 331.)

[44] On Aug. 9 and 10 the loyalists declared a blockade of insurgent ports. (The Bulletin of International News, Vol. XIII, No. 5, p. 7.) On Nov. 17 General Franco announced a blockade of Barcelona. (*Ibid.*, No. 8, p. 10.)

[45] *Ibid.*, No. 9, p. 36.

[46] John H. Latané, The Diplomatic Relations of the United States and Spanish America (1900), p. 56.

[47] 25 Fed. Rep. 408.

[48] Hershey, *op. cit.*, p. 204.

[49] "And where the fact of the existence of war is in issue in the instance of complaint of

Premier Blum, on August 1, 1936, in an appeal to the foreign ministries of Europe, urged the rapid adoption and immediate observance of an arrangement for non-intervention in Spain.[50] After five weeks of negotiations the "International Committee for the Application of the Agreement regarding Non-Intervention in Spain" met at London.[51] Representatives of twenty-six nations were present and through their action introduced what was felt to be a new practice in international law—non-intervention. The new attitude supplants neutrality as a policy for the purpose of the Spanish struggle. It is a matter of law that declarations of neutrality on the part of foreign Powers amount to recognition of belligerency. Is it not possible that the setting up of official non-intervention has a similar effect? A position of neutrality in a civil war interdicts only official governmental aid to the insurgents; help of a private nature is usually not considered violative of neutrality unless the individual's government flagrantly disregards the law regarding filibustering. But non-intervention, as announced at London, involves the control of activities of private individuals to a much greater extent than is necessitated by a declaration of neutrality.

In pursuance of this policy all governments in Europe have passed laws forbidding the direct or indirect exportation or reëxportation of arms, munitions and materials of war destined for Spain, Spanish possessions or the Spanish zone of Morocco.[52] Undoubtedly these laws have not been strictly observed; lack of complete understanding between Great Britain, France and Soviet Russia on the one side, and Italy, Germany and Portugal on the other, has made non-intervention, at best, but a stop-gap policy. Nevertheless, the principle remains as a collective and a particular announcement of official European policy toward Spain. But, unless one admits the existence of a state of belligerency, is this policy compatible with international law? In 1900 the Institute of International Law agreed that "in case of insurrection or civil war, international law imposes upon third Powers certain obligations toward established and recognized governments which are struggling with an insurrection." Supplies of munitions, while they may be sent to the recognized government, may not be furnished the insurgents.[53] At the Sixth Pan American Conference held at Havana in 1928, the participating nations agreed "To forbid the traffic in arms and war materials, except when intended for the (legitimate) government, while the belligerency of the rebels has not been

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acts committed within foreign territory, it is not an absolute prerequisite that the fact should be made out by an acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof." (Underhill *v.* Hernandez, 168 U. S. 253.) See also, *The Three Friends*, 166 U. S. 1; O'Neill *v.* Central Leather Co., 87 N. J. Law 532, 94 Atl. 789.

[50] Bulletin of International News, Vol. XIII, No. 4, p. 7.

[51] New York Times, Sept. 9, 1936.

[52] See texts in *L'Europe Nouvelle*, Sept. 26, 1936, Supplement.

[53] Scott, Resolutions of the Institute (1916), p. 157. See also, Westlake, *op. cit.*, I, p. 52.

recognized. . . ." [54] Until an insurrection has achieved the status of belligerency, it would seem, therefore, that the established government may expect partial treatment from third Powers. Non-intervention, which treats both combatants impartially, amounts to neutrality. While one can appreciate the diplomatic dilemma which gave birth to the policy, unless a recognition of belligerency was implicit in the move, non-intervention is legally incorrect.[55]

The passing months have witnessed changes in the original policy of non-intervention as well as the passage of legislation in several countries of the world supplementing it and rendering it more effective. On December 3, 1936, Great Britain published an act forbidding British shipping to carry war materials from any foreign port to any port in Spain.[56] On January 10, 1937, the British Foreign Office issued a warning that the recruiting of men for service in Spain and the acceptance of engagement in the forces of either side were penal offenses under the Foreign Enlistment Act of 1870.[57] A few days later a similar resolution was passed by the French Chamber and Senate.[58] Even the Government of the United States has lent its weight to the policy of non-intervention. A Joint Resolution passed by Congress on January 8 of this year made illegal the exportation of war materials to either side in the "civil strife" in Spain.[59] This was followed on May 1 by a second Joint Resolution restricting the soliciting and receiving of contributions for use in Spain.[60] The League of Nations took official notice of the program of non-intervention by adopting a resolution recommending that the League members on the committee "spare no pains to render the non-intervention undertakings as stringent as possible, and take appropriate measures to ensure forthwith that the fulfilment of the said undertakings is effectively supervised." [61]

The latest moves of the non-intervention committee carry the new policy to even greater lengths than before. On February 16 the Powers represented on the committee agreed "to extend the non-intervention agreement to cover recruitment in and transit through or departure from their respective countries of persons of non-Spanish nationality proposing to proceed to Spain or Spanish dependencies for the purpose of taking service in the present war." [62] A scheme of supervision was set up and, after some delay, on April 20 international observers were stationed on the French and Portuguese frontiers, and

[54] Art. I, Pan American Convention on the Duties and Rights of States in the Event of Civil Strife, U. S. Treaty Series, No. 814.

[55] See the forceful statement of Señor del Vayo, former Spanish Foreign Minister, at the League of Nations Assembly, Sept. 25, 1936. (New York Times, Sept. 26, 1936.) For similar opinions, see Alexandre Berenstein, *La Rébellion Espagnole devant le Droit international*, Geneva (1937), p. 2; The New Statesman and Nation, Dec. 19, 1936, p. 1016.

[56] See text of law in this JOURNAL, Supplement, Vol. 31 (April, 1937), p. 100.

[57] The Bulletin of International News, Vol. XIII, No. 22, p. 7.

[58] *Ibid.*, p. 7, note 1.

[59] Public Resolution No. 1, 75th Cong., 1st Sess.

[60] New York Times, May 6, 1937.

[61] The Bulletin of International News, Vol. XIII, No. 22, pp. 4–5.

[62] New York Times, Feb. 17, 1937.

British, French, German and Italian warships drew a cordon around the Spanish coast to supervise the enforcement of the new agreement.[63] Moreover, a technical advisory sub-committee has been assigned the duty of carrying this matter to its logical end by investigating the possibility of withdrawing from Spain all non-Spanish volunteers.[64] From the evidence available one may conclude that the policy and practice of non-intervention in many ways is even more deep-reaching than the observance of simple neutrality.[65] If the latter entails recognition of belligerency, why not the former?[66]

On December 4, 1936, the French and British Governments approached the German, Italian, Portuguese and Russian Governments with a request that they coöperate in mediating between the warring parties with a view to obtaining their consent to an armistice.[67] Action of this nature is usually predicated upon the existence of belligerency. ". . . mediation, necessarily implies the existence of two entities, of two parties, who for the moment are considered as having equal standing, rights and privileges, as belligerent forces." [68] Furthermore, foreign governments from time to time have sent to and received communications from the Burgos government of General Franco, dealing with the enforcement of the non-intervention committee's plan for the supervision of imports to Spain,[69] the territorial integrity of Spain and Morocco,[70] and the stopping of neutral vessels by insurgent warships.[71] On March 7 His Majesty's Government went so far as to dispatch two representatives to Burgos for discussions with the rebels on trade arrangements.[72] The governments of five nations of the world, Italy, Germany, Portugal, El Salvador and Albania, going much further than belligerency, have recognized the Burgos government, sending and receiving diplo-

[63] The Bulletin of International News, Vol. XIII, No. 22, pp. 8–9. (Russia, at the last moment, declined to take advantage of her right to participate in the patrol.) Officers of the patrolling vessels have no right of search or detention, but only the right to board, with a view to establishing identity. They have no executive powers and their duty is to verify the situation and report to their governments. (*Ibid.*, p. 9.)

[64] *Ibid.*, p. 11.

[65] "*Mais à un point de vue, l'accord crée aux États des obligations plus étendues que celles qui découleraient de l'application du statut de la 'neutralité.'* " (Alexandre Berenstein, *op. cit.*, p. 7.)

[66] As early as Aug., 1936, Great Britain committed an act usually reserved only to States who have declared their neutrality upon the outbreak of war when she interned a loyalist seaplane which could not leave Gibraltar within twenty-four hours. (The New Statesman and Nation, Aug. 15, 1936, p. 218.)

[67] London Times, Dec. 10, 11, 12, 13, 14, 1936.

[68] Tomas E. Palma, Cuban Belligerency, p. 22. Armistice is a word applicable only to belligerents. "It . . . cannot properly be applied to agreements between a government on the one side and rioters, brigands, or banditti on the other." (O'Neill *v.* Central Leather Co., 87 N. J. Law, 532, 94 Atl. 789.) See also, H. W. Halleck, International Law, 4th ed. (1908), p. 339; Moore, Digest, I, p. 194.

[69] The Bulletin of International News, Vol. XIII, No. 14, p. 48.

[70] London Times, Jan. 9, 12, 13, 1937.

[71] The Bulletin of International News, Vol. XIII, No. 22, p. 34.

[72] *Ibid.*, No. 19, p. 34.

matic agents.[73] The Spanish Embassy at the Vatican has been taken over by a delegate of the new government.[74] On January 28 an official communiqué announced at Rome the signing of a trade agreement with the Franco régime.[75] Intercourse on such a scale may raise the suspicion that the state of war is legal as well as real.[76]

Some authorities are agreed that recognition of belligerency by the parent State compels acquiescence in the new order on the part of foreign nations.[77] The move may be made by a formal announcement (this is rarely the case) or may be implied by an act of war, such as a blockade, affecting the interests of third Powers.[78] The latter method was adopted by Lincoln in 1861 and, though not intended as such, accorded the Confederacy belligerent rights. In the present struggle this step has already been taken by the loyalist government. On August 9 and 10 two decrees were published proclaiming that because of "criminal rebellion" certain territories should be considered as "zones of war" and "subject to blockade." Spanish Morocco, the Canary Islands, the territory of Ifni, the colony of Rio de Oro, and the coasts and territories of the provinces of Huelva, Cadiz, the Balearic Islands, Lugo, Coruña and Pontevedra were put in this category and the pronouncement was communicated to foreign Powers "to be acted upon."[79] If Lincoln's declaration of blockade by implication elevated the Confederacy to the position of a belligerent, the effect of Madrid's action may be no less potent.[80]

V

Regardless of the ultimate outcome, it is conceivable that one of the many naval incidents accompanying the war in Spain may furnish the basis for a suit coming within the jurisdiction of the Permanent Court of International

[73] Jessup, *loc. cit.*, p. 274.

[74] The Bulletin of International News, Vol. XIII, No. 8, p. 43.

[75] New York Times, Jan. 31, 1937.

[76] See the case of *The Hornet*, 2 Abbott 39.

[77] See above, p. 402.

[78] Whether a sovereign in suppressing a rebellion does so by regular law to be applied in the courts or by adopting the character of a belligerent assuming belligerent rights, "must be determined by the character of the act." (Rose *v.* Himely, 4 Cranch 239.)

[79] The Bulletin of International News, Vol. XIII, No. 5, pp. 7, 10.

[80] For a similar opinion see Barrister, "Blockades and the Law," in The New Statesman and Nation, Aug. 29, 1936, p. 281. It was contended by several neutral States, however, that the Spanish blockade was not real and effective. (Germany, England and the United States held this opinion. See New York Times, Aug. 21, 22, 27, 1936.) If this view is accurate, Spain's move may be described as simply an attempt to close insurgent ports by fiat, a step interdicted by international law and practice and incapable of bestowing a belligerent status upon the rebels. (See Norman J. Padelford, "International Law and the Spanish Civil War," this JOURNAL, Vol. 31 (April, 1937), p. 231.) Padelford denies the view that the belligerency of the rebels has been recognized by implication. He feels that when third Powers recognize in this way, "the acts setting up the implication must be such as to leave no doubt but that they have accepted the exercise of belligerent rights by the struggling parties." (*Ibid.*, p. 236.)

Justice. Assuming such a case to revolve around the exercise of maritime rights on the high seas in the absence of a specific acknowledgment of belligerency, the Court might be presented with these arguments: The contestants are entitled to belligerent rights because (1) belligerency is automatically conceded, or is even a matter of right, once a struggle approaches the magnitude of the Spanish war; (2) the activities of foreign Powers in setting up the non-intervention committee, refusing aid to the legitimate government, offering to mediate between the parties, engaging in intercourse with the rebels and even acknowledging their government, amount to recognition by implication; (3) the acts of military and maritime warfare initiated by the loyalist government are acts of belligerency endowing the rebels with the rights of war. Conversely, opposing counsel might insist that a state of legal war, entailing full belligerent rights, is entirely contingent upon specific recognition by outside States.

The time may have arrived when the latter view, based upon the applicability of the principle of sovereignty in international relations, should give way to the practice of collective action and collective decision. Left to individual determination, belligerency, despite its existence in fact, may be refused because of the inconveniences thereby thrust upon the merchant vessels of the recognizing Power.[81] This principle, carried to its logical conclusion, might conceivably result in the refusal of foreign Powers to recognize a legal state of war when the conflict is between two independent nations.[82] That this would breed international discord goes without saying. Moreover, recognition or non-recognition may too easily become a form of intervention, also productive of friction.[83] Americans vividly recall the blunder made by the State Department under Stimson during the Brazilian revolt of 1930.[84] The question whether a state of war actually and legally exists, either in internal or external disputes, is a matter that might well be left for Geneva to determine.

[81] In refusing to recognize Cuban belligerency in 1875, President Grant gave as one reason that it would bring upon American merchants a good deal of inconvenience and discomfort. (Moore, Digest, I, pp. 195-196.) See also, Fenwick, *op. cit.*, p. 112.

[82] " . . . this nation is its own judge when to accord rights of belligerency, either to a people struggling to free themselves . . . or to independent nations at war with each other." (President Grant's message of Dec. 6, 1869, Moore, Digest, I, p. 194.)

[83] American recognition of the South American republics ". . . was dictated partly by sympathy with the revolutionists. . . . The recognition of the belligerency of Greece by Great Britain in 1825 was similarly inspired . . ." (Fenwick, *op. cit.*, p. 113); as was British recognition of the South during the American Civil War.

[84] For a criticism of our diplomacy in this case, see Moore, Candor and Common Sense (1930).